Supreme Court, U.S.
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No. 408

In the Supreme Court of the United States

October Term, 1961

[redacted]

Petitioners,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

[redacted]

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 508

WOODLAND TERRACE, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The report of the Standing Master (R. 22–36) and the order of the district court confirming the master's report (R. 55–60) are unreported. The opinion of the Court of Appeals for the Fourth Circuit (Pet. App. 1–10) is reported at 293 F. 2d 505.

JURISDICTION

The judgment of the Court of Appeals was entered on August 5, 1961. The petition for a writ of certiorari was filed on October 19, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Housing Administration (F.H.A.) was entitled to foreclose its mortgage on petitioner's rental housing project because of the mortgagor's default.

2. Whether, in the event of a foreclosure, F.H.A. is precluded by law from securing a deficiency judgment against the mortgagor.

STATUTES INVOLVED

The pertinent provisions of the National Housing Act are set forth in the Appendix, *infra*, pp. 10–12.

STATEMENT

Petitioner, Woodland Terrace, Inc., was organized in 1949 for the purpose of constructing, operating and managing a rental housing project under Section 608 of the National Housing Act of 1947, 12 U.S.C. 1743. On May 5, 1949, petitioner obtained from the Wachovia Bank and Trust Company an F.H.A. insured loan of $1,256,100 payable in monthly installments of principal and interest over a period of approximately thirty-three years. The loan was evidenced by a note and secured by a mortgage which expressly provided for foreclosure in the event of default and for a deficiency judgment if the mortgaged property were sold for less than the debt due (R. 1–4, 5–14).

Subsequently, petitioner constructed, operated, and managed the housing project. Petitioner defaulted in the payment of the installment due April 1, 1957, and all subsequently accruing installments. On May 28, 1957, petitioner wrote to the district office of the

F.H.A. requesting a "work-out arrangement," explaining that its financial difficulty was due to a twenty per cent vacancy rate (R. 195–97). On June 13, 1957, the State Director of the F.H.A. informed petitioner that no consideration could be given the request until the mortgagee elected to assign the mortgage or to acquire the property for tender to F.H.A. (R. 198). On June 27, 1957, the State Director informed petitioner that F.H.A. officials in Washington, D.C., had decided to foreclose as soon as the mortgage was assigned (R. 199). On July 12, 1957, the mortgage was assigned to F.H.A. and, on January 17, 1958, foreclosure proceedings were commenced. The execution of the mortgage, the fact of default, and the amount due were admitted (Pet. 3), but petitioner, as here, challenged the right of the government to foreclose (R. 17–20) and secure a deficiency judgment (R. 15–16). In this connection, petitioner relied upon various general directives and statements by F.H.A. officials.[1] It insisted that these directives and statements constituted an enforceable promise by F.H.A. that it would not foreclose a mortgage on a Section 608 project if the default resulted from a decrease in occupancy.

The case was referred to the district court's Standing Master who rejected petitioner's defenses and recommended the entry of a decree of foreclosure and a deficiency judgment (R. 22–36). Over petitioner's objections (R. 36–55), the district court confirmed

[1] The directives and statements are set forth in the petition at pp. 4–11.

the report and entered judgment accordingly (R. 55–60). The Court of Appeals for the Fourth Circuit affirmed, 293 F. 2d 505 (Pet. App. 1–10). It held that the F.H.A. had not promised to relinquish the right to foreclose but merely had indicated a willingness, as a procedural matter, to consider a request for a "work-out arrangement." In the court's view, petitioner had not established any procedural irregularity in this regard. The court went on to hold that Congress had authorized the F.H.A. to obtain a deficiency judgment.

ARGUMENT

Petitioner seeks review in this Court of the holding below that the Federal Housing Administration properly exercised its right to foreclose petitioner's mortgage and to assess a deficiency judgment. That holding is clearly correct. Moreover, it does not conflict with the decisions of this Court or any other court. Nor is the question of sufficient importance, in itself, to warrant this Court's review.[2]

1. As petitioner implicitly concedes, the mortgagee could have foreclosed the mortgage on petitioner's project. In terms, the mortgage provides for foreclosure by the mortgagee in the event of a default and for a deficiency judgment if the sale of the mortgaged property brings less than enough to satisfy the debt and costs (R. 5–14). Petitioner claims, however, that foreclosure by F.H.A. is precluded

[2] Officials of the Federal Housing Administration have advised us that more than 5,500 similar mortgages were insured by F.H.A. on October 31, 1961. Of that number, seventy mortgages were in the process of foreclosure.

by a wide variety of directives and statements by various F.H.A. officials (Pet. 4–11). Petitioner insists that they must be construed as substantive guarantees by which F.H.A. relinquished the right to foreclose petitioner's mortgage (Pet. 18).

This suggested reading is plainly without merit. Nowhere did F.H.A. represent, either expressly or impliedly, that it had relinquished its right to foreclose defaulted mortgages if it deemed such action necessary to safeguard its interests. A reading of the statements referred to in the petition (Pet. 5, 7, 8) indicates clearly that all that was stated was that *consideration* would be given to a readjustment of a project mortgage in the event of financial difficulty. Indeed, it would have been entirely unreasonable for any borrower to have supposed that F.H.A. would have waived its rights in the manner urged by petitioner. As petitioner itself notes, the Administration has insured billions of dollars of mortgage debts, largely in reliance upon its primary remedy of foreclosure.[3]

2. Petitioner next contends (Pet. 18–20) that proper consideration was not given to its request for a "work-out arrangement." It stresses that no reasons were given for the rejection and that no evidence was introduced by F.H.A. in the district court

[3] While the court below did not need to reach the point, the district court held alternatively that the parole evidence rule would bar any consideration of the F.H.A. statements. If certiorari is granted, the government may urge this point as an additional ground for affirmance.

to support its decision to foreclose. However, as the court of appeals correctly held, "F.H.A. was not required to offer such evidence. It would be wholly useless to require it in every foreclosure proceeding to affirmatively prove procedural regularity at all levels with respect to every step, when no evidence of irregularity had been offered. The burden of going forward was upon the mortgagor." 293 F. 2d at 509 (Pet. App. 8). Cf. *United States ex rel. Accardi* v. *Shaughnessy,* 347 U.S. 260; *Shaughnessy* v. *United States ex rel. Accardi,* 349 U.S. 280; *Service* v. *Dulles,* 354 U.S. 363.

3. Petitioner also challenges the fairness of the determination to foreclose, arguing "that the equities strongly favored petitioner" (Pet. 19). Plainly, however, the decision as to whether to exercise its legal right to foreclose upon default is that of the mortgagee alone. Moreover, the record discloses that the determination to foreclose was not made arbitrarily, but rather was based upon F.H.A.'s close scrutiny of the conduct of petitioner's operations and its dissatisfaction with certain aspects of it.[4]

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[4] The court below noted (Pet. App. 3) (293 F. 2d 507, fn. 2):

"FHA was informed of the financial affairs of Woodland Terrace. The parties were involved in a current controversy over them. FHA was seeking to have restored to Woodland Terrace:

"(1) The profit made by a 'related' construction company on the construction of the buildings and improvements,

"(2) cash disbursed by Woodland Terrace in payment for a majority of its common stock which it had purchased pro rata from its common stockholders. (This transaction occurred before enactment of the special provisions relating to 'collapsible corporations.' See *Burge* v. *Commissioner,* 4 Cir., 253 F.

There is no greater substance to petitioner's contention that principles of equity and fairness demand that the F.H.A., as a preferred shareholder of the corporation, is "bound to take over and operate the project for the shareholders' benefit" (Pet. 22). While F.H.A. may have reserved the right to do so as additional security for its guarantee, it was clearly under no duty to forego its primary protection, the right to foreclose upon the mortgage.

4. Finally, petitioner challenges the right of the F.H.A. to a deficiency judgment. Although the mortgage executed by petitioner expressly provides for such a deficiency judgment, the governing statute, 12 U.S.C. 1743, *infra*, pp. 10–11, does not expressly so provide, and petitioner argues that F.H.A. is limited to the remedies specifically authorized by Congress. There is no indication, however, that Congress intended by its silence to relinquish such an important right, which F.H.A. as assignee of the mortgage would otherwise have.

2d 765; *Spangler* v. *Commissioner*, 4 Cir., 278 F. 2d 665; *Bryan* v. *Commissioner*, 4 Cir., 281 F. 2d 238; *Pomponio* v. *Commissioner*, 4 Cir., 288 F. 2d 827. Apparently, these disbursements were not included in the taxable income of the stockholder-recipients), and

"(3) cash disbursed as ordinary, but substantial, dividends on the common stock (e.g. $400 per share, though apparently on the reduced number of shares outstanding after the earlier stock redemption).

"The stockholders, denying they were obligated to restore anything to Woodland Terrace, had made an offer to pay $125,000 into the corporation on specified conditions. FHA had not accepted this conditional offer.

"The merits of this earlier controversy are not before us. Its existence shows, however, that FHA, rightly or wrongly, was dissatisfied with the earlier conduct of the financial affairs of Woodland Terrace and was familiar with it."

Indeed, the contrary inference is required. The entire statutory scheme evidences an intent to put F.H.A. in the stead of the mortgagees. Section 608 of the National Housing Act, 12 U.S.C. 1743, specifically contemplates the assignment to F.H.A. of "all rights and interests arising under the mortgage so in default [and] all claims of the mortgagee against the mortgagor or others, arising out of the mortgage transaction."[5] Section 608(f) of the National Housing Act, 12 U.S.C. 1743(f), also incorporates by reference the provisions of Section 207(k) of the Act, 12 U.S.C. 1713(k), which gives F.H.A. the right to foreclose mortgages which it has acquired by assignment and, pending acquisition of the title to the mortgaged property, to exercise all of the rights of a mortgagee.[6] The import of this broad authority to the F.H.A. is obviously to give it all of the rights and claims of the mortgagee, including the specifically enumerated rights contained in the mortgage. Indeed, if Congress had intended to prohibit F.H.A. enforcement of such claims, it would have been purposeless to authorize their acquisition and to condition the mortgagee's right to the benefit of the insurance upon their assignment. At the very least, prosecution of such claims as are incident to foreclosure represents an exercise of one of the rights

[5] 12 U.S.C. 1743(c) (1) and (2), quoted *infra*, p. 10.

[6] As the court of appeals held, "When in a foreclosure proceeding, FHA seeks a deficiency judgment, it exercises that right of the mortgagee before, and, therefore, 'pending,' its acquisition of title to the mortgaged property within the meaning of § 207(k)." 293 F. 2d at 510; Pet. App. 10.

of the mortgagee authorized by Section 207(k), 12 U.S.C. 1713(k).[7]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1961.

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[7] Petitioner places great stress on the fact that Congress failed to incorporate Section 207(l), 12 U.S.C. 1713(l), in Section 608 (Pet. 23). Contrary to petitioner's suggestion (Pet. 23), Section 207(l) does not expressly provide for a deficiency judgment and, hence, the failure to incorporate that section does not fairly yield petitioner's inference that this omission was a deliberate refusal to grant F.H.A. the authority to assess a deficiency judgment.

APPENDIX

The National Housing Act, as amended, 12 U.S.C. 1701, *et seq.*, provides in pertinent part:

Section 608 [12 U.S.C. 1743].

* * * * *

(c) The failure of the mortgagor to make any payment due under or provided to be paid by the terms of a mortgage insured under this section shall be considered a default under such mortgage, and if such default continues for a period of thirty days, the mortgagee shall be entitled to receive the benefits of the insurance as hereinafter provided, upon assignment, transfer, and delivery to the Commissioner, within a period and in accordance with rules and regulations to be prescribed by the Commissioner of (1) all rights and interest arising under the mortgage so in default; (2) all claims of the mortgagee against the mortgagor or others, arising out of the mortgage transaction; (3) all policies of title or other insurance or surety bonds or other guaranties and any and all claims thereunder; (4) any balance of the mortgage loan not advanced to the mortgagor; (5) any cash or property held by the mortgagee, or to which it is entitled, as deposits made for the account of the mortgagor and which have not been applied in reduction of the principal of the mortgage indebtedness; and (6) all records, documents, books, papers, and accounts relating to the mortgage transaction. * * * *Provided,* That the mortgagee in the event of a default under the mortgage may, at its option and in accordance with regulations of, and in a period to be determined by the Commissioner,

proceed to foreclose on and obtain possession of or otherwise acquire such property from the mortgagor after default, and receive the benefits of the insurance as herein provided, upon (1) the prompt conveyance to the Commissioner of title to the property which meets the requirements of the rules and regulations of the Commissioner in force at the time the mortgage was insured, and which is evidenced in the manner prescribed by such rules and regulations; and (2) the assignment to him of all claims of the mortgagee against the mortgagor or others, arising out of the mortgage transaction or foreclosure proceedings, except such claims that may have been released with the consent of the Commissioner. Upon such conveyance and assignment, the obligation of the mortgagee to pay the premium charges for insurance shall cease and the mortgagee shall be entitled to receive the benefits of the insurance as provided in this subsection, except that in such event the 1 per centum deduction, set out in (i) hereof, shall not apply.

* * * * *

(f) The provisions of section 1713(k) of this title shall be applicable to mortgages insured under this section, except that as applied to such mortgages (1) all references in such section 1713(k) to the "Housing Fund" shall be construed to refer to the "War Housing Insurance Fund", and (2) the reference therein to "subsection (g)" shall be construed to refer to "subsection (c)" of this section.

* * * * *

Section 207(k) [12 U.S.C. 1713(k)].

(k) *Acquisition of property by conveyance or foreclosure.*

The Commissioner is authorized either to (1) acquire possession of and title to any property, covered by a mortgage insured under this sec-

tion and assigned to him by voluntary conveyance in extinguishment of the mortgage indebtedness, or (2) institute proceedings for foreclosure on the property covered by any such insured mortgage and prosecute such proceedings to conclusion. The Commissioner shall so acquire possession of and title to the property by voluntary conveyance or institute foreclosure proceedings as provided in this section within a period of one year from the date on which any such mortgage becomes in default under its terms or under the regulations prescribed by the Commissioner. * * * Pending such acquisition by voluntary conveyance or by foreclosure, the Commissioner is authorized, with respect to any mortgage assigned to him under the provisions of subsection (g) of this section, to exercise all the rights of a mortgagee under such mortgage, including the right to sell such mortgage, and to take such action and advance such sums as may be necessary to preserve or protect the lien of such mortgage.

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